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QUESTION PRESENTED

I. WHETHER THE IMPLEMENTATION OF A NARROWLY TAILORED AND VOLUNTARY INCENTIVE CLAUSE IN THE PROCUREMENT PROCESS IS A PROPER EXERCISE OF THE GOAL AND OPPORTUNITY PROVISION OF SECTION 502 OF THE SMALL BUSINESS ACT AND CONSTITUTIONALLY PERMISSABLE?

TABLE OF CONTENTS

Page

QUESTION PRESENTED. i

TABLE OF AUTHORITIES. ii

CONSENT OF THE PARTIES 1

INTEREST OF THE AMICUS CURIAE 1

STATEMENT OF THE CASE. 2

SUMMARY OF THE ARGUMENT. 2

ARGUMENT

I. THE SCC AND DBE ELIGIBILITY REQUIREMENTS COMPORT WITH THE SMALL BUSINESS ACT AND, AS IMPLEMENTED, VIOLATE NEITHER THE NONDELEGATION RULE, NOR IS BEYOND THE SCOPE OF AUTHORITY RULE AND IS OTHERWISE CONSTITUTIONALLY PERMISSABLE ..5

II. THE SCC IS A CONSTITUTIONALLY PEMISSIBLE, NON-MANDATORY POTENTIAL REMEDIAL DEVICE TO IMPLEMENT SECTION 502, THROUGH THE PROCUREMENT PROCESS TO ACHIEVE THE WILL OF CONGRESS . .12

Page

III. THE SCC SEEKS TO IMPLEMENT SECTION 502 OF THE SMALL BUSINESS ACT WHICH HAS BEEN A CONSIDERED DECISION OF THE PRESIDENCY 15

IV. THE DECISION OF THE PRIME CONTRACTOR TO ACTIVATE THE SCC CLAUSE AND THE ENSUING OFFER AND ACCEPTANCE BY THE PRIME CONRACTOR AND SUBCONTRACTOR IS A PRIVATE ACT 16

V. THE SCC PROGRAM IS SO NARROWLY TAILORED THAT IT TRAMMELS NOT ON THE RIGHTS OF WHITES 20

TABLE OF AUTHORITIES

Cases **Page**

Adarand Constructors, Inc. v. Pena,
16 F.3d 1537 (10th Cir. 1994),
cert. granted, 63 U.S.L.W. 3255
(U.S. Sept. 26, 1994)(No. 93-1841) . . . . . *passim*
Allen v. Wright, 468 U.S. 737 (1984). 19
Blum v. Yaretsky, 457 U.S. 991 (1982). 19
Bolling v. Sharpe, 347 U.S. 497 (1954) 17
Cargo of Brig Aurora, v. U.S., 11 U.S. 382 (1813). 6
Chevron, U.S.A., Inc. v. Natural Resources
Defense Council, Inc., 467 U.S. 837 (1984) 7
Fullilove v. Klutznick, 448 U.S. 448 (1980) . . . . . *passim*
Humphrey's Executor v. U.S., 295 U.S. 602 (1935) 6
Lujan v. Defenders of Wildlife, 112 S.Ct. 2130,
504 U.S. ___ (1992) 19
McCulloch v. Maryland, 17 U.S. (4 Wheat) 316 (1819) . . 6
Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) . . 6
Mistretta v. U.S., 488 U.S. 361 (1989) 6
Podberesky v. Kirwin, No. 93-2527, slip op.,
(4th Cir. Oct. 27, 1994). 19
Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) . . . 26
Rust v. Sullivan, 500 U.S. 173 (1991) 19
U.S. v. Touby, 909 F.2d 759 (3d Cir. 1990)
aff'd 111 S.Ct. 1752 (1991). 6, 15
Valley Forge College v. Americans United,
454 U.S. 464 (1982) 19

Table of Authorities Continued

Constitutional Provision **Page**

U.S. CONST. amend. V 3, 5, 24
U.S. CONST. amend. XIV, §5. . . . . 3, 5, 24

Statutes

Small Business Act, Pub. L. No. 95-507,
92 Stat. 1771, 15 U.S.C. §631 *et seq.*. 4

15 U.S.C. §631 2
15 U.S.C. §637(a) 8

Small Business Act, Pub. L. No. 100-656,
102 Stat. 3881, 15 U.S.C. §644(g),
Section 502. . . . . *passim*

15 U.S.C. §644(g) 8, 10
15 U.S.C. §644(g)(2). 10
15 U.S.C. §644(h) 9

Surface Transportation Uniform Relocation
Assistance Act ("STURAA"),
Pub. L. No. 100-17,
101 Stat. 144 §106(c) 1987. . . . . 7, 8, 14

Surface Transportation Assistance Act, ("STAA"),
Pub. L. No. 97-424,
96 Stat. 2100 §105(f). 7, 8, 9, 17

Table of Authorities Continued

Congressional Hearings, Federal Register and Other **Page**

124 CONG. REC. 29641 (1978) 14
133 CONG. REC. 33314-33316 (1987) 14
134 CONG. REC. 300057 (1988) 13,14
134 CONG. REC. 31491-31492 (1988) 13,14

Exec. Order No. 11,518, 35 FED. REG. 4,939 (1970). . . 16
Exec. Order No. 12,432, 48 FED REG. 32,551 (1983). . . 16
Exec. Order No. 12,190, 45 FED. REG. 7773 (1994) . . . 16
Exec. Order No. 12,928, 59 FED. REG. 48,377 (1994) . . 16

Hearings on Federal Contracting Opportunities for Minority and Women-Owned business: An Examination of the 8(d) Subcontracting Program, Before the Senate Committee on Small Business, 98th Cong., 1st Sess. (1983). 14,17

Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business, 97th Cong., 2d Sess. (1982) 15

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Table of Authorities Continued

Page

H.R. CONF. REP. NO. 1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507 12

Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807, Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 15-18 (1988) 12,13

Minority and Small Business Contracting Policies of the Agency of the House Comm. on International Relations 95th Cong., 1st Sess. 53, 64 (1977)(testimony of Timothy L. Jenkins) 13

Small and Minority Business in the Decade of the 1980s, Part 1, House Committee on Small Business, 97th Cong., 1st Sess. (1981) 15

To Amend the Small Business Act to Extend the Current SBA 8(a) Pilot Program: hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980) 15

Articles, Papers, and Other Sources

ARTHUR L. CORBIN, *Offer and Acceptance and Some of the Resulting Legal Relations*, 26 YALE L.J. 169 (1917) 4

Table of Authorities Continued

Page

THEODORE CROSS, THE BLACK POWER IMPERATIVE: RACIAL INEQUALITIES AND THE POLITICS OF NONVIOLENCE 799 (1984) 16

JOHN H. ELY, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723 (1974) 27

FELIX FRANKFURTER, *Some Reflections on the Reading of Statutes*, in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 43 (1963) 11

RESTATEMENT (SECOND) OF CONTRACTS, §24 (1979) 4

ROBERT E. SUGGS, *Rethinking Minority Business Strategies* 25 HARV. C.R.-C.L. L. REV. 101 (1990). 18

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No. 93-1841

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,
Petitioner,

v.

FEDERICO PEÑA, Secretary of Department of Transportation; THOMAS D. LARSEN, Administrator of the Federal Highway Administration; LOUIS N. MACDONALD, Administrator Region VIII of the Federal Highway Administration; and JERRY BUDWIG, Division Engineer of the Central Federal Lands Highway Division,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

BRIEF AMICI CURIAE OF THE NATIONAL BAR ASSOCIATION AND THE COUNCIL OF 100-AN ORGANIZATION OF BLACK REPUBLICANS, INC. IN SUPPORT OF RESPONDENTS

CONSENT OF THE PARTIES

Petitioner and Respondent have consented to the filing of this brief.

INTEREST OF AMICI CURIAE

The National Bar Association (NBA) was founded in 1925. It is an organization comprised of over 20,000 African American lawyers who are located across the United States and the world. The NBA's mission is to promote social justice for improvement of the education, societal and

economic welfare of African Americans and other socially and economically disadvantaged Americans.

The Council of 100-An Organization of Black Republicans, Inc. was founded in 1974. The Council is a nonprofit, national association of African American Republicans headquartered in Washington, D.C., with members throughout the United States. The objectives of the Council are, *inter alia*, to disseminate information and mobilize support for traditional Party principles and ideas regarding economic empowerment, tolerance and inclusion, and fiscal responsibility.

STATEMENT OF THE CASE

Amici adopts the Statement of the Case as presented by Respondent.

SUMMARY OF THE ARGUMENT

Congress, through the Small Business Act, requires the Executive Branch to use its purchasing power to foster the development of small businesses, including small businesses owned and controlled by socially and economically disadvantaged persons. *See generally* 15 U.S.C. §631 (Declaration of Policy)(the "Act"). The Act requires annual, government-wide goals to be set for purchases of supplies and services from small business enterprises and small disadvantaged business enterprises (DBEs), and sets a floor for the DBE procurement goal. The statutory definition of DBE includes, but is not limited to a racial component. Not exclusively race-based, the eligibility standards includes persons who have been subjected to "ethnic prejudice or cultural bias."

Amici argue that Congress has broad powers to enact such legislation and to delegate authority to the Executive Branch to implement its will; and that in delegating such authority, the Act is unambiguous about its intent to create

constitutionally permissible "goals and opportunities" for small business enterprises and socially and economically disadvantaged business enterprises. Amici argue that the use of a remedial expedient, the Subcontracting Compensation Clause ("SCC"), by Respondent to achieve the purposes of the Small Business Act, as amended, and supplemented by essential appropriation acts and procurement policies, comport with the will of Congress and do not violate the nondelegation rule. All government actions were within the scope of its authority, and lawful.

Further, Amici argue that the SCC, a mere remedial expedient inviting a private act for a valuable government privilege, does not compel any private act for the valuable government privilege. We emphasize that under the SCC, no government action is unbound, no governmental obligation vests, no liability of the government or prime contractor is created until the prime contractor is selected and thereafter exercises its sole discretion to accept the invitation of offer set forth by the terms of the SCC. Amici submit that the selection of the DBE by Mountain Gravel & Construction Company in the exercise of its discretion under the SCC, objected to by Petitioner was a private act, not a cognizable action for the valuable government privilege under the Equal Protection Clause of the Fifth Amendment to the U.S. Constitution.

Alternatively, Amici argue that the remedial expedient, SCC, as narrowly tailored by its own terms and the policies of the Executive Branch is as permissible as the set-aside program upheld by the Court in *Fullilove v. Klutznick*,[1] and its progeny.[2] We submit that the proper scope of judicial review adopted in *Fullilove* is the controlling precedent in this case, if the constitutional guarantee claimed by Petitioner is a cognizable state action.

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[1] 488 U.S. 448 (1980).

[2] *See, e.g., Metro Broadcasting v. FCC*, 497 U.S. 547 (1990).

The SCC is just what it explains itself to be: a clause of a federal procurement contract which *invites offers, subject to acceptance*,[3] for monetary compensation "for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals."[4] The invitation for offer is made as part of the procurement process which lets contracts under a bidding procedure established by the Federal Acquisition Regulation System ("FAR"),[5] and implements the acquisition-related section of various congressional statutes, including the Small Business Act.[6] Drawing on the opinion of the court below, on September 15, 1989, a division of the Department of Transportation Central Federal Lands Highway Division ("CFLHD"), awarded a $1-million-plus prime contract to a small business contractor (Mountain Gravel & Construction Company), for a federal highway project in Colorado known as the West Dolores project.[7] Amici understand that Mountain Gravel was bound to fulfill the mandatory terms of the contract which had been awarded to it. However, the SCC remained in a state of equipoise, as a continuing contractual incentive, which, according to its terms would either vest, or be rejected solely within the sole discretion of Mountain Gravel. Hence, acceptance of the terms of the

[3] RESTATEMENT (SECOND) OF CONTRACTS, §24, defines an offer as "a manifestation of willingness to enter into a bargain so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it." An invitation to offer in government contracts need not be accepted, but the power of acceptance permits the offeree to transform the offer into a contractual obligation. *See* ARTHUR L. CORBIN, *Offer and Acceptance and Some of The Resulting Legal Relations*, 26 Yale L.J. 169, 181-182, 199-200 (1917).

[4] *Adarand Constructors, Inc. v. Pena*, 16 F.3d 1537, 1541 (10th Cir.) *cert. granted*, 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994)(No. 93-1841).

[5] *See* Record at 000110, *Adarand*, 16 F.3d 1537.

[6] Pub. L. No. 95-507, 92 Stat. 1771, 15 U.S.C. §631, *et seq.*

[7] *Adarand*, 16 F.3d at 1541.

continuing offer incentive was voluntary and premised on a condition precedent: compensation could be awarded to Mountain Gravel, on condition that it accept the invitation to offer by awarding a relevant subcontract to small business concerns owned and controlled by socially and economically disadvantaged individuals,[8] denominated as DBE.

The bidding process went forward to subcontract for the guardrail systems. Petitioner and a certified DBE[9] responded to the government's invitation to offer. Mountain Gravel, acting on the continuing offer under the SCC, awarded the subcontract to the DBE. Petitioner is before the Court claiming that the above described optional incentive program (SCC) is constitutionally impermissible because it violates the Equal Protection clause of the Fifth and Fourteenth Amendments to the U.S. Constitution.[10]

I. THE SCC AND DBE ELIGIBILITY REQUIREMENTS COMPORT WITH THE SMALL BUSINESS ACT AND, AS IMPLEMENTED, VIOLATE NEITHER THE NONDELEGATION RULE, NOR IS BEYOND THE SCOPE OF AUTHORITY RULE AND IS OTHERWISE CONSTITUTIONALLY PERMISSIBLE

The judicial principle undergirding the nondelegation rule permits Congress to delegate, by statute, or amendment, the authority to implement the will of

[8] *Id.*

[9] "The record gives no indication of the racial composition Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women." *Id.* at 1542 n.8.

[10] *Adarand*, 16 F.3d 1537, *cert. granted*, 63 U.S.L.W. 3255 (U.S. Sept. 26, 1994)(No. 93-1841).

Congress. The nondelegation rule[11] is an old rule and an important one because the people depend on this rule to assure that Congress does its work. Hence, when Congress delegates its authority to a legislative agency,[12] a judicial unit,[13] or to an arm of the Executive Branch,[14] the text of the organic or amending act is required to establish general policy or standards to guide the delegate in the creation of tools to fill in the blanks to enable the delegate to fulfill the will of Congress in an efficient and effective manner, as an administrative function.[15]

This process enables Congress, in an exceedingly complex nation, in which there exist ongoing conflicting interests, to carry out, to fund, correct, amend or repeal, its actions on behalf of the people.[16] The delegation process permits needed elasticity--as guided by Congress--by federal agencies to implement, correct, create, amend or repeal administrative actions, or to use appropriated funds in an exceedingly complex nation toward the resolution of conflicting interests. The delegation process and the incidental funding process is a means by which Congress reinforces its responsibilities incident to representation,[17] one

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[11] *See Cargo of Brig Aurora v. U.S.*, 11 U.S. 382 (1813).

[12] *Humphrey's Executor v. U. S.*, 295 U.S. 602 (1935).

[13] *Mistretta v. U. S.*, 488 U.S. 361 (1989).

[14] *U. S. v. Touby*, 909 F.2d 759 (3d Cir. 1990), *aff'd* 111 S.Ct. 1752 (1991).

[15] *Id.*

[16] *Id.*

[17] *McCulloch v. Maryland*, 17 U.S. (4 Wheat) 316 (1819), stating, "The people of all the States have created the general government and have conferred upon it the general power of taxation. The people of all the States, and the States themselves, are represented in Congress, and, by their representatives, exercise this power." *Id.* at 435. Amici's search of the record does not show the absence of support for the Small Business

that the Court has by tradition given deference, and shunned countermajoritarian intervention.[18]

In this case, Petitioner seeks the reversal of a decision which rejected Petitioner's claim that the terms of Section 502 of the Small Business Act of 1988, do not authorize the implementation of a remedial expedient contractual clause used by the Department of Transportation ("DOT") to carry out the will of Congress to provide potential opportunities for DBEs to minimally share in the wealth of their nation. Petitioner makes this argument because his company was not selected as a subcontractor under the instant contract which contained a clause providing for a non-mandatory incentive allowing the prime contractor to select a disadvantaged business enterprise ("DBE") to build a guardrail at the West Dolores Project in the State of Colorado. The prime contractor is White and the DBE is one of the following socially and economically disadvantaged Americans: Black American, Hispanic American, Asian-Pacific American or Subcontinent-Asian American. 15 U.S.C. §637 (d)(3)(C).[19]

Act programs enacted in 1978 or 1988 by any member of the Senate or House representatives from the State of Colorado. However, even if there had been, it would not have undermined the reinforcement of the will of Congress to enact such a law.

[18] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)(an agency's pronouncements will be given great deference, even, and particularly when the underlying statute is ambiguous).

[19] As pointed out by the court below:

> STURAA, and previously STAA, define "socially and economically disadvantaged individuals" with reference to the Small Business Act. 15 U.S.C. §637(d). Under the Small Business Act, a small business must be at least 51% owned and controlled by individuals who are socially and economically disadvantaged. *Id.* Members of certain minority racial and ethnic groups and women are presumed socially and economically disadvantaged. *Id.* That presumption is rebuttable under the DBE criteria incorporated into CFLHD's SCC

But, under the SCC and the scheme under attack in this case, the prime contractor could have selected a White DBE, if it qualified as being socially and economically disadvantaged. 15 U.S.C. §637 (a) *et seq*.

Section 502 of the Small Business Act, Pub. L. No. 100-656, 102 Stat. 3881 (codified as amended in 15 U.S.C. §644(g)) states:

> The President shall annually establish Government -wide goals for procurement contracts awarded to small business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals. The Government-wide goal for participation by small business concerns shall be established at not less than 20 percent of the total value of all prime contract awards for each fiscal year. The Government-wide goal for participation by small business concerns owned and controlled by socially and economically disadvantaged individuals shall be established at not less than 5 percent of the total value of all prime contract and subcontract awards for each fiscal year. Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents, for that agency, the maximum practicable opportunity for small business concerns and small business and

program. Both minority- owned (DBEs) and women-owned small business enterprises (WBEs) may be decertified if it can be established that they are not socially and economically disadvantaged. Non-minority-owned small businesses also are eligible for DBE certification by the Small Business Administration, provided that they satisfy the same eligibility minority-owned small business.

See 15 U.S.C. §637(a)(*citing* Surface Transportation Uniform Relocation Assistance Act, Pub. L. No. 100-17, 101 Stat. 144 §106(c) (1987); Surface Transportation Assistance Act, Pub. L. No. 97-424, 96 Stat. 2100 §105(f)); *see also Adarand*, 16 F.3d at 1541 (internal footnote omitted).

> economically disadvantaged individuals to participate in the performance of contracts let by such agency.

Section 502, as required under the delegation rule, contains goals to be established by the agency delegates. Textually, it mandates the establishment of government-wide goals at not less than 20% for small businesses and not less than 5% for disadvantaged businesses. Although a government-wide goal is accentuated, the text clearly and plainly guides the agency delegate toward annually discretionary goals that reflect the "maximum practicable opportunity" for DBEs to participate in the federal procurement contracting process.[20] The text of 502 establishes the President's authority and the criterion to govern the President's course. Section 502 directs: "The Administration and the Administrator of the Office of Federal Procurement Policy shall, when exercising their authority pursuant to paragraph (2), insure that the cumulative annual prime contract goals for all agencies meet or exceed annual Government-wide prime contract goal established by the President pursuant to this paragraph."[21]

The language of the Act is embracing, but is specifically canal by practicability, realism, cooperative, and limited government, and ultimately, private judgement. As first codified, the limitations expressed in the Act guide the "[SBA] and the head of each Federal agency" to assure that the goals "shall realistically reflect the potential of small

[20] No sanctions exist in law against any government agency if the goal and opportunity provision of Section 502 is not reached. All that is required is an explanation to Congress justifying the shortfall, if any, of the goal. *Adarand*, 16 F.3d at 1541 (*citing* 15 U.S.C. §644(h)). However, the reporting provision is important because it demonstrates Congress's continuous concern and need to know the reason why the goal and opportunity provision of Section 502 is not being met. In is in such reports that a department, such as DOT, could report to Congress that prime contractors are not responding to the government's invitations under the SCC.

[21] *Adarand*, 16 F.3d at 1540 n.3.

business concerns and small business concerns owned and controlled by socially and economically disadvantaged individuals to perform such contracts and to perform subcontracts under the contracts."[22] The text of 502 is neither vague or unintelligible. To the contrary, it is clear, plain and intelligible, despite Petitioner's claim that the term "goal" has no substantive meaning in Section 502.[23] Strangely, Petitioner does not link a second operative word that has significant meaning in remedial legislation. The word is "opportunity." Repetition of a portion of Section 502 demonstrates the point: "Notwithstanding the Government-wide goal, each agency shall have an annual goal that presents...the maximum practical opportunity" for small businesses and concerns owned and controlled by socially and economically disadvantaged individuals...." 15 U.S.C. §644(g). The word "opportunity" has a meaning which, in the context of the word "goal", are both quite clear standards.

Three dictionaries covering a period of nearly one hundred years make the case for a meaning that is more than descriptive. The word opportunity is an active word. The

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[22]15 U.S.C. §644(g)(2).

[23]Petitioner's Reply Brief at 5, *Adarand*, 16 F.3d 1537. To conclude that the term has no substance is to belie the manner in which the word is used in the context of Section 502. Its meaning and the substance of its meaning must be read in the light of the context of the Act. Many words isolated from other words may not have an intelligible meaning, but that is not the case here. Reference to leading dictionaries aid Amici's view that the word goal has meaning and purpose. The 1899 edition of the UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 2337 (Robert Hunter and Charles Morris eds. 1899), defines the terms goal as "The final purpose or aim; the end at which a person aims, or to which a design is directed; the end. The 1945 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY UNABRIDGED 1071 (2d ed. 1945), defines goal as "[T]he end to which a design tends; aim; purpose...to seek, reach...a goal...." THE WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED 972 (Philip Babcock Grove ed. 1986), defines goal as "The end toward which effort...is directed."

1899 edition of the UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 3335, defines "opportunity" as "Fit, opportune, or convenient times..., a...suitable or propitious occasion or chance.[24] The 1948 edition of WEBSTER'S NEW INTERNATIONAL DICTIONARY OF ENGLISH AND LANGUAGE UNABRIDGED defines "opportunity" as "a time or place favorable for executing a purpose; suitable combination of conditions; suitable occasion; chance." The 1986 version of WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY defines "opportunity" as "a combination of circumstances, time and place suitable or favorable for a particular activity or action...an advantageous circumstance or combination of circumstances, esp. when affecting security, wealth, or freedom (as from constraint)...a time, place, or condition favoring advancement or progress...SYN OCCASION, CHANCE, BREAK, TIME: OPPORTUNITY indicates a combination of circumstances facilitating a certain action or inviting a certain decision...."[25] Amici assert that when the terms "goal" and "opportunity" are read in the context of the remedial purpose of the Act, there is no basis to Petitioner's claim that Congress gave no substantive guidance, or imposed no limitations, on federal agencies in carrying out congressional will under Section 502. Clearly, federal agencies could reasonably interpret that Congress expected these agencies, in the exercise of their discretion, and within the plain meaning of the terms of the Act, to create "a combination of circumstances facilitating a certain action or inviting a certain decision."[26] Amici agree with Justice Frankfurter's opinion that "[a] problem in statutory construction can seriously bother courts only when there is a contest between probabilities of meaning,"[27] which is absent in this case.

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[24]*Id.* (UNIVERSAL DICTIONARY).

[25]*Id.* (NEW INTERNATIONAL DICTIONARY).

[26]*Id.* (THIRD NEW INTERNATIONAL DICTIONARY).

[27]FELIX FRANKFURTER, *Some Reflections on the Reading of Statutes*, in ESSAYS ON JURISPRUDENCE FROM THE COLUMBIA LAW REVIEW 43, 44 (1963).

II. THE SCC IS A CONSTITUTIONALLY PERMISSIBLE, NON-MANDATORY POTENTIAL REMEDIAL DEVICE TO IMPLEMENT SECTION 502, THROUGH THE PROCUREMENT PROCESS TO ACHIEVE THE WILL OF CONGRESS

At the Department of Transportation, the SCC was that certain non-mandatory contractual incentive to attempt to implement the "specific goals and practical opportunities provision" of Section 502,[28] supported by the weight of the legislative history, and the 1988 amendments to the Small Business Act, introduced as S. 1993, and H.R. 1807.[29] The

[28] As the legislative history of Section 502 shows, Congress mandates a government-wide procurement goal of no less than 20% for small business, and no less than 5% for DBEs. *See* H. R. CONF. REP. No. 1070, 100th Cong., 2d Sess. 73 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5401, 5507, which states that "each procuring agency is required to establish a similar goal consistent with its mission, and such goals shall not be less than the government-wide goal established by the President."

[29] That members of Congress were both aware and concerned about the dearth of minority participation in the commerce of the nation is demonstrated by the testimony of Sen. Sasser in connection with S. 1993 and H.R. 1807, who said:

> Minorities are still less likely to own a small business. Some 1.8% of the minority population owned a business in 1982 compared with 6.4 percent of all business owners. Moreover, minority-owned firms are smaller than nonminority businesses with lower sales and fewer employees...The question of minority business ownership is one that demands continued attention by this committee and by the entire Congress...These hearings and the Chairman's legislative proposal...are an effort to get the 8(a) program to focus on its original statutory objective. That objective is simply enough--to boost minority ownership of small businesses that can compete in a competitive market.

Minority Business Development Program Reform Act of 1987: Hearings on S. 1993 and H.R. 1807, Before the Senate Committee on Small Business, 100th Cong., 2d Sess. 15-18 (1988)(emphasis added).

During these hearings, Sen. Kerry's testimony also is

Department of Transportation, and its competent modes, responsible for carrying out the will of Congress, were aware of the statements of Sen. Bumpers, who co-sponsored S. 1993 and H.R. 1807 for the creation of goals for DBE participation under the federal procurement process.[30] The testimony of Cong. Conte, Cong. LaFalce, and Sen. Weiker could not be discounted by DOT modes in fashioning the SCC relative to DBEs,[31] particularly in light of congressional

instructive. Sen. Kerry testified that "100 firms in the [Section 8(a)] program received almost 55 percent of the $3.1 billion in 8(a) procurement, [that] [n]early 1,500 firms were forced to split the remaining contracts available, and [that] more than 1,500 firms got absolutely nothing at all." *Id.* at 8.

During these hearings, Sen. Levin, focussing on the word opportunity, testified that the 8(a) programs provides "important business opportunities to members of our society who have been denied such opportunities." *Id.* at 189 (the reason why the 8(a) programs needed improvement against fraud).

The government-wide concern of Congress relative to the plight of minority enterprises and the federal government's contracting processes has been the concern of both Republican and Democratic administrations. *See, e.g., Minority and Small Business Contracting Policies of the Agency of the House Comm. on International Relations*, 95th Cong., 1st Sess. 53, 64 (1977)(testimony of Timothy L. Jenkins).

These hearings and the legislation that ensued demonstrate the continuing concerns of Congress to expend the government's funds in a way to provide opportunities for minority participation. Even short of the specific concerns expressed in the hearings, Congress is better equipped to make assumptions and draw the same conclusion because the collective assumptions of the representative branch is not done without presumed Member scrutiny. This is no doubt why in the *Fullilove* decision, "it was within Congressional power to act on the *assumption* that in the past some non-minority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Fullilove*, 448 U.S. at 485 (Burger, C.J.)(emphasis added).

[30] 134 CONG. REC. 31491-31492 (1988).

[31] 134 CONG. REC. 30057 (1988)(Cong. Conte highlighted the President's Report on the State of Small Business: that "[b]usiness ownership as a

hearings revealing the continuing present difficulty facing minority firms and past discrimination.[32]

The legislation that Congress enacted is reflective of its concerns in both the organic Small Business Act and the two transportation funding authority acts (STAA and STURAA) and is reflective of its investigation into the dearth of and discrimination against DBEs. The enactment of 502 of Small Business Act in 1988 demonstrates continuous concerns by Congress about the plight of minority and small businesses in the free market doing business with the government. These concerns also were expressed in the 1978 amendments to the Small Business Act, with the enactment of Section 221, Pub. L. No. 95-507, 92 Stat. 1770. This law requires federal agencies, in cooperation with the Small Business Administration, to establish "realistic goals" for DBE opportunities in federal government contracts in excess of $10.000,[33] and no limitation exist in the law or Section

percent of the population is 1.8 percent for all minorities versus 6.4 percent nationwide[; and that] while minorities comprise 22 percent of the national population, they account for approximately 6 percent of government dollars [demonstrating the need for continued efforts in support of [DBEs]." *Id.* *See also* 133 CONG. REC. 33314-33316 (1987)(statement of Cong. LaFalce); 134 CONG. REC. 31493 (1988)(statement of Sen. Weicker).

[32] *See, e.g., Hearings on Federal Contracting Opportunities for Minority and Women-Owned Businesses: An Examination of the 8(d) Subcontracting Program, Before the Senate Committee on Small Business*, 98th Cong., 1st Sess. (1983); *Hearings on the State of Hispanic Small Business in America, Before the Subcommittee on SBA and SBIC Authority, Minority Enterprise and General Small Business Programs of the House Committee on Small Business*, 99th Congress, 1st Sess. (1985).

[33] Supporting testimony of Sens. Glenn and Heinz establish a continued historic truth: that minority businesses were not more than 4% of the total number of businesses in the U.S. with not over 1% of the total business. 124 Cong. Rec. 29641 (Sen. Glenn), 29644 (Sen. Heinz)(1978). The continuous concerns of Congress appear in several hearings on a host of issues relative to small and minority firms. *See, e.g., To Amend the Small Business Act to Extend the Current SBA 8(a)*

502 which would cut off the authority exercised by CFLHD.[34]

Drawing on the opinion of the court below, on September 15, 1989, CFLHD awarded a $1-million-plus prime contract to a small business contractor (Mountain Gravel & Construction Company), for a federal highway project in Colorado known as the West Dolores project.[35] Amici understand that Mountain Gravel, a non-governmental entity, was bound to fulfill the mandatory terms of the contract which had been awarded to them. However, Amici assert that the SCC remained in the state of dormancy until the prime contractor elected to act on the terms of the clause. At this point compensation could be awarded to Mountain Gravel, on condition that it award a relevant subcontract to non-exclusive small business concerns owned and controlled by socially and economically disadvantaged individuals,[36] denominated as Disadvantaged Business Enterprises.

III. THE SCC SEEKS TO IMPLEMENT 502 OF THE SMALL BUSINESS ACT WHICH HAS BEEN A CONSIDERED DECISION OF THE PRESIDENCY

As in *Fullilove*, Section 502, and its implementing fabric has not only been a considered decision by Congress, but that of successive presidential administrations reaching back to Presidents Eisenhower and Nixon and forward to

Pilot Program: Hearings on H.R. 5612 Before the Senate Select Committee on Small Business, 96th Cong., 2d Sess. (1980); *Small and Minority Business in the Decade of the 1980s, Part 1, House Committee on Small Business*, 97th Cong., 1st Sess. (1981); *Hearings on Minority Business and its Contributions to the U.S. Economy, Senate Committee on Small Business*, 97th Cong., 2d Sess. (1982).

[34] *See, e.g., Touby*, 909 F.2d at 769.

[35] *Adarand*, 16 F.3d 1537.

[36] *Id.*

President Clinton. In some measure, each of these administrations have attempted "to strive to eliminate obstacles to the growth of small business."[37] In 1983, President Reagan signed an Executive Order requiring federal agencies to establish objectives for encouraging prime contractors to utilize minority enterprises. The Reagan administration's program also required each federal agency to develop programs that would give prime contractors incentives to use minority business subcontractors.[38] In this area, the Reagan administration's program and President Carter's policy efforts were compatible.[39]

Likewise, President Clinton's policies have continued the policy direction of past administrations regarding efforts by the Executive Branch to set goals and to provide opportunities for DBEs, as prime and subcontractors to have "a fair opportunity to participate in Federal procurement."[40] The SCC is such a goal and opportunity.

IV. THE DECISION OF THE PRIME CONTRACTOR TO ACTIVATE THE SCC CLAUSE AND THE ENSUING OFFER AND ACCEPTANCE BY THE PRIME CONTRACTOR AND SUBCONTRACTOR IS A PRIVATE ACT

[37]Exec. Order No. 11,518, 35 Fed. Reg. 4,939 (1970). Of course, the reach of presidential power to aid black people to compete in the nation reaches back to 1863, with the signing of the Emancipation Proclamation. *See* THEODORE CROSS, THE BLACK POWER IMPERATIVE: RACIAL INEQUALITIES AND THE POLITICS OF NONVIOLENCE 799-805 (1984).

[38]Exec. Order No. 12,432, 48 Fed. Reg. 32, 551 (1983).

[39]Exec. Order No. 12,190, 45 Fed. Reg. 7773 (1980).

[40]Exec. Order No. 12,928, 59 Fed. Reg. 48,377 (1994).

Amici assert that the selection of the DBE was a private action[41] and not a state action implicating either the Fourteenth or Fifth Amendments to the U.S. Constitution. The choice to act on the continuing invitation under the SCC was not a governmental action.

The bidding process went forward by Mountain Gravel to subcontract for the guardrail systems. Petitioner and a certified DBE[42] responded to the invitation to offer and Mountain Gravel, acting on the continuing invitation under the SCC, independently, without compulsion, and by private action, awarded the subcontract.

If Mountain Gravel had not acted on the continuing invitation, the DBE would, we think, absent some common law right of action, have no standing, or a federal right of action against Mountain Gravel or the DOT to compel Mountain Gravel to act on the SCC, (unless there exist a federal private right of action). Nor would the DBE have had a right of action under the Fifth Amendment to enjoin Petitioner from being selected to build the guardrail, if Petitioner had been the choice of the prime contractor as the subcontractor.

Hence, this case is not like the segregation case in the District of Columbia where the state compelled the action held to be a denial of equal protection under the Fifth Amendment.[43] The fact that the SCC was an incentive to implement the goal and opportunity provision of Section 502, cannot be determined (short of speculation) that

[41]Amici can agree with Petitioner's concession to the extent that it asserts that "a private individual...has made the decision to issue a subcontract..." Brief of Petitioner at 20, *Adarand*, 63 U.S.L.W. 3255.

[42] "The record gives no indication of the racial composition Adarand's ownership, although its general manager is a white male and its stockholders include the general manager's wife and two other women." *Adarand*, 16 F.3d at 1542 n.8.

[43]*Bolling v. Sharpe*, 347 U.S. 497 (1954).

Mountain Gravel considered it to be in its best business interest only to select a DBE.[44] Other market place and efficiency considerations could logically influence a prime contractor's discretion to avoid the incentive allowing compensation for providing "direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work."[45] Where, as here, the prime contractor is free to accept, or not to accept the invitation under the SCC, the government is a mere bystander at this point in the same manner that it is a bystander in waiting, if, and until, the prime contractor decides to exercise the power of acceptance under the terms of the SCC. Amici submit that it is because Congress may not always compel private actions in the market place that it may create incentives which may cause an actor to act on its own in ways that the government may be constrained to do.[46]

Even if it is the view of Petitioner that the SCC is a compulsory and not a discretionary clause, a prudential burden rest upon Petitioner to demonstrate that an injury in fact is a direct causal result of more than a *perceived*[47]

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[44]*See* Record at 000035, *Adarand*, 16 F.3d 1357 (the SCC clearly shows the wide range of discretion in the SCC, as well as second tier discretion of subcontractors to contract with whom they wish. As the text of the SCC clearly and unambiguously shows, there is no government compulsion at any tier.).

[45]*Id.* at 000035 (the SCC).

[46]The history of Amici in the country clearly shows that the government cannot prevent the private acts of prime contractors from discriminating in public procurement, and "[e]ven if [it] could...discrimination in private commercial transactions undermines the ability of minority firms to qualify as suitable prime contractors or subcontractors on government contracts." ROBERT E. SUGGS, *Rethinking Minority Business Strategies*, 25 HARV. C.R.- C.L. L. REV. 101, 114 (1990).

[47]Amici notes that the only evidence Mountain Gravel's state of mind is that it "felt compelled to give the subcontract of the guardrail work to Gonzales Construction." Brief of Petitioners at 10-11, *Adarand*, 63

compulsory government action.[48]

U.S.L.W. 3255. Respectfully, it is submitted that if today African-Americans cannot perceive racism when the history of the country and certain localities acted upon it; Petitioner (through Mountain Gavel's) claim about how Mountain Gravel "felt" ought not to be weighted in fact to validate a perception of racism when none is present in the SCC about which Petitioner complains. See *Podberesky v. Kirwin*, No. 93-2527, slip op. at 8-9 (4th Cir. Oct. 27, 1994). The history of advantage is as relevant as history of disadvantage and racial denial as written in history books. *Id.* at 8.

[48]*Id.* at 115; Record, *supra* note 44. The Court has recently stated that "`[t]he mere fact a business is subject to state regulation does not by itself convert its action into that of the State for purposes of the Fourteenth Amendment...The complaining party must...show that `there is a sufficiently close nexus between the State and the challenged action of the regulated party entity so that the action of the latter may be fairly treated as that of the State itself.'" *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982)(internal citation omitted). The Court added that "Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power, or has provided such significant encouragement, either overt or covert., that the choice must in law be deemed to be that of the State...Third, the required nexus may be present if the private entity has exercised powers that are `traditionally the exclusive prerogative of the State." *Id.* It is submitted that the SCC is a mere remedial expedient inviting a private act for a valuable government privilege. By its terms, it is not a coercive device, and is proper device in furtherance of the Spending Clause of the Constitution. *Fullilove*, 448 U.S. at 474. Nor, in the exercise of its discretion, is the prime contractor required to "exercise powers that are `traditionally the exclusive prerogatives of the State.'" *Blum*, 457 U.S. at 1005. Thus, no state action is involved when a SCC is merely included in a federal contract inviting an offer to do a discretionary, future act, if exercised. *See Valley Forge College v. Americans United*, 454 U.S. 464, 473 (1982); *Allen v. Wright*, 468 U.S. 737, 751, 753 (1984); *Lujan v. Defenders of Wildlife*, 504 U.S. ____, 112 S.Ct. 2130 (1992), regarding prudential limits.

Finally, it is submitted, the organic statute, appropriation acts and implementing procurement policy (SCC) under the delegation doctrine appear to be equally as constitutional in substance and methodology as government regulations that limit funds to state agencies that encourage or promote abortion as a method of family planning. *See Rust v. Sullivan*, 500 U.S. 173 (1991).

V. THE SCC PROGRAM IS SO NARROWLY TAILORED THAT IT TRAMMELS NOT ON THE RIGHTS OF WHITES

A critical question posed by this case, *sub judice*, is whether the Constitution prohibits Congress and the Executive Branch from exercising its broad delegation of power (and the receipt thereof) that result in the a remedial expedient that does not trammel on the rights of White people?

Petitioner has stipulated "that Section 502 satisfies the evidentiary requirements of [*Fullilove v. Klutznick*]."[49] Hence, Amici now focuses more critically on whether a remedial expedient, such as the SCC, used by DOT, is narrowly tailored to achieve the remedial purpose of Section 502. Amici submit that the SCC is not only narrowly tailored, but is more fined tuned than the program appropriately upheld in *Fullilove*.

Congress passed the Public Works Employment Act of 1977 which provided financial assistance to build public facilities. The Act required that absent an administrative waiver, 10% of the funds granted for the projects had to be used to procure services or supplies from minority business enterprises ("MBEs"). Under the program, the grantees and their prime contractors, were required to seek out all available, qualified, *bona fide* MBEs. MBEs could be awarded the set-aside even though their bids were not the lowest, and responsive bid--so long as the higher bids when challenged, were found to reflect merely attempts to cover costs inflated by the present effects of prior disadvantaged and discrimination. A grantee under the program could waive the set-aside. A complaint procedure existed under the program to assure that only *bona fide* MBEs participated therein.

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[49] *Adarand*, 16 F.3d 1546.

The Petitioner in *Fullilove* sued alleging that this congressionally created program violated the Fourteenth and Fifth Amendments to the U.S. Constitution. They challenged the program on three grounds: (1) that the set-aside program was invalid on its face; (2) that the MBE program deprived nonminority business of access to at least some portion of the government contracting opportunities generated by the Act; and (3) that Congress made no findings to support the need for the set-aside provision.

The Court rejected all of these claims. First, the Court determined that Congress is a competent and the most qualifies body to determine the remedial needs of its citizens, even when the remedy is based on race-conscious criteria.[50] Secondly, the Court determined that "when effectuating a limited and properly tailored remedy to cure the effects of prior discrimination, such a 'sharing of the burden' by innocent parties is not impermissible...The actual `burden' shouldered by nonminority firms is relatively light....."[51] Third, the Court determined that "Congress is not expected to act as though it were duty bound to find facts and make conclusions of law. The creation of national rules for the governance of our society simply does not entail the same concept of recordmaking that is appropriate to a judicial or administrative proceeding."[52]

Amici submit that if Petitioner in the instant case has been trammeled, such injury claimed must be within the four corners of the expedient that presumably is the subject

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[50] *Fullilove*, 448 U.S. at 483-484 .

[51] *Id.* at 484.

[52] *Id.* at 502 (Powell, J., concurring). *Id.* at 478 (Burger, C.J.). The Court also determined that "[I]t was within congressional power to act on the assumption that in the past some nonminority businesses may have reaped competitive benefit over the years from the virtual exclusion of minority firms from these contracting opportunities." *Id.* at 485 (Burger, C.J.).

matter of its claim. The remedial expedient is the SCC, which provides, in pertinent part:

> Section 108.--PROSECUTION AND PROGRESS [53]
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> 108.01 Subcontracting. This subsection is supplemented to include a Disadvantaged Business Enterprise (DBE) Development and Subcontracting Compensation Provision as follows:
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> Monetary compensation is *offered* [emphasis added] for awarding subcontracts to small business concerns owned and controlled by socially and economically disadvantaged individuals. A DBE shall mean a small business concern owned and controlled by socially and economically disadvantaged individuals as defined under the FAR Contract Clause 52.219-8 entitled "Utilization of Small Business Concerns Owned and Controlled by Socially and Economically Disadvantaged Individuals" or a woman owned business as defined under FAR Contract Clause 52.219-13.
>
> * * * *
>
> Compensation is provided to the Contractor to locate, train, utilize, assist, and develop DBEs to become fully qualified contractors in the transportation facilities construction field. The Contractor shall also provide direct assistance to disadvantaged subcontractors in acquiring necessary bonding, obtaining price quotations, analyzing plans and specifications, and planning and management of the work. The Contractor shall maintain records documenting these activities and shall make them available for Government review upon request.

[53] Appendix at I-25, *Adarand*, 16 F.3d 1537.

> If the DBE subcontractor subcontracts (2nd tier) all or part of its work to a non-DBE subcontractor, payment under this provision may be adjusted accordingly by the Engineer. The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs. However, if the DBE subcontractor subcontracts only insignificant portions of the subcontract while still doing the major portion of the work, the prime contractor may receive full compensation under this provision.
>
> * * * *
>
> The Contractor will become eligible to receive payment under this subcontracting compensation provision when the dollar amount (based on final subcontracted amount) of the disadvantaged business enterprise subcontract(s) awarded exceeds 10 percent of the original contract amount.
>
> The Contractor will be paid an amount computed as follows:
>
> 1. If a subcontract is awarded to one DBE, 10 percent of the final amount of the approved DBE subcontract, not to exceed 1.5 percent of the original contract amount.
>
> 2. If subcontracts are awarded to two or more DBEs, 10 percent of the final amount of the approved DBE subcontracts, not to exceed 2 percent of the original contract amount.
>
> * * * *

The SCC is an instrument which invites the activation of a private party's own judgment rather than joint

or collective compulsion of it. Amici submit that the SCC is so narrowly tailored that it guarantees nothing to DBEs. Under the SCC, DBEs must wait for the activation of the SCC by prime contractors, such as Mountain Gravel, who for reasons of their own may or may not respond to the invitation of offer by the government to use a DBE as a subcontractor.[54] The SCC is self-tailored because it is neither mandatory or wrought with penalty. The intent of the government, clearly stated in the text of the SCC, is to invite the prime contractor to participate in the goal and opportunity program authorized by Section 502, and implemented by the selected remedial expedient. The decision not to use a DBE for whatever reason requires no justification or excuse by the prime contractor to be in compliance with the overall contract. The terms of the SCC are less demanding than the waiver provision that exists in *Fullilove*.[55] Here, the prime contractor is neither required to seek a waiver from, or to ask permission of the government to do anything prior to responding, or not responding to the invitation for offer under the SCC. The SCC creates no monopoly on government funds.[56] If a monopoly exist, it may be for the substantial expenditure of federal dollars to

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[54] A prime contractor is not guaranteed any additional compensation should the selected DBE then subcontract a portion of its work to a non-DBE. "The prime contractor may only receive compensation for that portion of subcontract work which is actually performed by DBEs." Appendix at I-25, *Adarand*, 16 F.3d 1537.

[55] *Fullilove*, 448 U.S. at 481-482 (opinion of Burger, C.J.).

[56] *Id.* at 532 (Stevens, J., dissenting). The SCC is no historical monument. It will teach Americans nothing about the costs associated with a sovereign's grant of exclusive privileges because, and it might surprise the population to discover, there are no sovereign exclusive guarantees to DBEs involved in this case. *Id.* What the SCC will teach is that DBEs must wait on prime contractors to decide if it is in their interests or the interest of the market place to activate the SCC. Clearly, under the SCC program, "the provision stigmatizes as inferior neither a minority firm that benefits from it nor a nonminority firm that is burdened by it." *Id.* at 521 (Marshall, J., concurring in judgment).

persons other than DBEs, the very opposite which undergirds the intent of Congress under of Section 502 of shared opportunity for wealth. Amici again emphasize that both Congress, and DOT leave this judgment, *a priori*, in the sole discretion of private parties.[57] Amici again note that the prime contractor is free to select DBE subcontractors who are White[58] and certified by any government agency. Hence, Amici, respectfully, requests the Court to ponder whether a claim under the Fifth Amendment would be cognizable if Mountain Gravel had subcontracted, under the self-tailored terms of the SCC, the work to a DBE that happened to be White as indeed it can.

Amici submits that any claim by Petitioner that it has been abused has been correctly rejected by the district court below, as affirmed by the decision of the Tenth Circuit herein on review. The Tenth Circuit's decision persuasively provides, we think, the most reasonable decisional direction for the Court take:

> The district court found that the challenged program satisfies *Fullilove* because it serves important governmental objectives and is substantially related to achievement of those objectives. 790 F.Supp. at 244. The district court concluded that the challenged program was narrowly tailored to achieve its statutory objectives because it does not mandate its provisions in an inflexible manner. It ensures minimum impact on non-DBEs because `[t]o qualify for DBE status a business must demonstrate, via the annual certification process, that it is a *bona fide*

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[57] *Id.* at 484 ("Failure of nonminority firms to receive certain contracts is, of course, an incidental consequence of the program, not part of its objective; similarly, past impairment of minority-owned access to public contracting opportunities may have been an incidental consequence of `business as usual' by public contracting agencies and among prime contractors.").

[58] *Adarand*, 16 F.3d 1541.

DBE, eligible to participate in the program. The annual certification mechanism is reasonably calculated to insure legitimate qualified participants, so that the program does not become overinclusive in the sense of tolerating abuse of the program by non-DBEs. Likewise the program is not underinclusive since it provides that businesses not entitled to the presumption of DBEs status may apply for certification and establish their qualifications to participate. *Id*.... Because eligibility is based on economic disadvantage, non-minority-owned businesses also are eligible to participate. The SCC program is not overinclusive since minority businesses that do not satisfy the economic criteria cannot qualify for DBE status. Furthermore, the SCC program is `appropriately limited in extent and duration' because federal procurement and construction contracting practices are subject to regular `reassessment and reevaluation by Congress.' *See Fullilove*, 488 U.S. at 489 (opinion of Burger, C.J.).[59]

V. CONCLUSION

In conclusion, Amici submit that Petitioner's attempt to invite the Court to divert its attention to *Richmond v. J.A. Croson*[60] as the standard for judicial review is misplaced because the facts are different,[61] the political racial makeup (apparently relevant in *Croson*) of the political decision makers is different,[62] the constitutional authority and the

[59] *Adarand*, 16 F.3d at 1546-1547. *See also Fullilove*, 448 U.S. at 486, 487-488, 490, 521.

[60] 488 U.S. 469 (1989).

[61] Paralleling a statement made by Justice Scalia in *Croson* relative to *Fullilove*, Amici do not believe that decision in *Croson* controls the appeal before this Court. *Id*. at 552.

[62] *Id. at* 495 (O'Connor, J.); *id*. at 553-554 (Marshall, J., dissenting).

assignment of power under our instrument of rule is different,[63] and the remedial expedient, the SCC, is different. Amici assert that the program involved in this appeal would have been upheld under less than strict scrutiny review if it had preceded the Court's decision in *Fullilove*.

Respectfully submitted,

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Amici, and the deep and rich history to which we are rooted, and the kaleidoscope of injustices that Amici and our ancestors have experienced supports our determination that there is something worthy of consideration in Professor Ely's words that require them to be spread on the record: "When the group that controls the decision making process classifies so as to advantage a minority and disadvantage itself, the reasons for being unusually suspicious, and, consequently, employing a stringent brand of review are lacking. A White majority is unlikely to disadvantage itself for reasons of racial prejudice; nor is it likely to be tempted either to underestimate the needs and secrets of Whites relative to those of others, or to overestimate the cost of devising an alternative classification that would extend to certain Whites the advantages generally extended to Blacks...." JOHN HART ELY, *The Constitutionality of Reverse Discrimination*, 41 U. CHI. L. REV. 723, 735-736 (1974). A careful reading of the facts of this case and the reality of the SCC program does not rise the level of undue disadvantage to Whites which would, we think, cause the Court to arouse the *Croson* decision and to transport it to the seat of the National Government.

[63] *Compare Fullilove, 488 U.S.* at 510 (Powell, J., concurring) with *Croson*, 488 U.S. at 486-493, 499-505 (opinion of the Court).